

A Ketheeswaran a/l Kanagaratnam & Anor v Public Prosecutor

B HIGH COURT (KLANG) — NOTICE OF MOTION NO BL-44-6-09
OF 2020
AZMI ABDULLAH J
3 JUNE 2021

C *Constitutional Law — Legislation — Constitutionality — Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 s 61A — Deposition of victims who could not be found accepted as evidence without cross-examination — Whether contravened Federal Constitution — Whether judicial power of courts to decide or arrive at decision excluded — Whether legislation was contrary to rule of law — Federal Constitution arts 5(1), 8(1) & 121(1)*

E *Statutory Interpretation — Canons of construction — Specialia derogant generalibus — Legislation contained express provision to prevail — Whether specific provision prevailed over the more general provisions — Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 s 5*

F The challenge mounted in this motion by the applicants was against the constitutionality of s 61A of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 ('the ATIPSOM') with the impugned provision being argued to be against arts 121(1), 8(1) and 5(1) of the Federal Constitution ('the FC'). The applicants were facing three charges at the Klang Sessions Court under s 12 of the ATIPSOM. The prosecution delivered on the applicants as part of the evidence for the prosecution pursuant to s 51A of the Criminal Procedure Code ('the CPC') the depositions made by three persons

G mentioned as the victims in the three charges. The sessions court judge exercising the provision of s 30(1) of the Courts of Judicature Act 1964, stayed the proceedings and transmitted the matter to the High Court to determine the constitutional challenge against s 61A of the ATIPSOM. The arguments of the applicants were that: (a) the act of determining whether there was prima facie evidence involved judicial assessment hence the power to decide a prima facie case was a judicial power that should rightly be exercised by a judge and no other. By virtue of art 121(1) of the FC, the power to decide prima facie evidence was a judicial power that was vested in the courts. Section 61A of the ATIPSOM had the effect of excluding the judicial power to adjudicate whether

H the victim's evidence proved a prima facie evidence hence rendering it unconstitutional due to legislative incursion; (b) art 5(1) of the FC prohibits the enactment of any legislature that would deprive life, liberty, or the rule of law. Since s 61A had deprived the applicants of the right to cross-examine the deponents, the formers' right to liberty had been transgressed; and (c) all

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persons were equal before the law and are entitled to equal protection of the law, hence the applicants should be fairly treated with fair procedure. The denial of the right to challenge the deposition and to cross-examine the witness was a clear violation of art 8(1) of the FC.

Held, dismissing the motion:

- (1) Section 61A of the ATIPSOM by its wording still retained the court's judicial power to rule and decide with the court's powers not being transgressed as the arbiter to make a finding and to arrive at a decision. Section 61A was concerned only with prima facie evidence and the consideration of the deposition in itself did not provide a prima facie case whereby in order to establish a prima facie case the courts still had to view the evidence in totality in arriving at a decision. This went to show that the court's function as the final arbiter was not encroached upon and thus the section did not usurp the powers of the court hence s 61A of the ATIPSOM did not infringe art 121(1) of the FC (see paras 14 & 22).
- (2) It had always been the position of the law that the right to cross-examine was not absolute. Given the fact that s 61A of the ATIPSOM was a specific and explicit law which had been provided for as being the exclusion stated in art 5(1) of the FC, hence the application of s 61A of the ATIPSOM could not be deemed to be in contravention of art 5(1) of the FC. It did not deny a fair trial since the deposition was only a single aspect of the evidence to be produced at trial and even then it was still subject to be examined by the trial judge. This evidence by deposition was not the be all and end all as regards evidence to prove a prima facie case. Thus, the impugned provision did not infringe upon art 5(1) of the FC (see paras 29–30).
- (3) Where there were two procedures existing side by side, the one that was more drastic and prejudicial was unconstitutional if there was in the law no guideline as to the class of cases in which either procedure was to be resorted to, but it was constitutional if the law contained provisions for appeal, so that a decision under it may be reviewed by a higher authority. Section 61A did not fall foul of this condition as to infringe upon art 8 of the FC given the provision for appeal therein contained in the ATIPSOM. For s 61A of the ATIPSOM, the court did not defer to anyone or entity in deciding and retained absolute power in making a judicial assessment as regards the deposition made (see paras 34–35).
- (4) From the reading of s 5 of the ATIPSOM, it was clear that the provisions contained in s 61A would override the requirement as found in s 145 of Evidence Act 1950 due to the use of the maxim *generalibus specialia derogant*. Section 5 of the ATIPSOM itself provided for the application of the ATIPSOM to prevail in the event that it conflicted with provisions of other written laws and superseded the other written laws and this was the

- A situation of the maxim *generalibus specialia derogant* being applicable which was that a general Act was made subject to a specific Act. It was apparent that certain specific provisions in the legislation were designed to prevail over the more general provisions of the law and, therefore, these must be given its full effect. Section 61A of ATIPSOM did not contravene arts 121(1), 8(1) and 5(1) of the FC and should not be declared unconstitutional (see paras 37–38 & 43).
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[Bahasa Malaysia summary]

- C Bantahan yang dikemukakan dalam usul ini oleh pemohon adalah terhadap perlembagaan s 61A Akta Antipemerdagangan Orang dan Antipenyeludupan Migran 2007 ('ATIPSOM') dengan peruntukan yang dipersoal dihujahkan bertentangan dengan perkara 121(1), 8(1) dan 5(1) Perlembagaan Persekutuan ('PP'). Pemohon menghadapi tiga pertuduhan di Mahkamah Sesyen Klang di bawah s 12 ATIPSOM. Pihak pendakwaan menyampaikan kepada pemohon sebagai sebahagian daripada keterangan bagi pihak pendakwaan menurut s 51A Kanun Tatacara Jenayah ('KTJ') pemdeposan yang dibuat oleh tiga orang yang disebut sebagai mangsa dalam tiga pertuduhan tersebut. Hakim mahkamah sesyen dalam menggunakan peruntukan s 30(1) Akta Mahkamah Kehakiman 1964, menggantung prosiding dan membawa perkara tersebut ke Mahkamah Tinggi untuk menentukan bantahan perlembagaan terhadap s 61A ATIPSOM. Penghujahan pemohon adalah: (a) tindakan dalam menentukan sama ada terdapat keterangan prima facie melibatkan penilaian kehakiman maka kuasa untuk memutuskan kes prima facie adalah kuasa kehakiman yang sepatutnya dilaksanakan oleh hakim dan bukan yang lain. Berdasarkan perkara 121(1) PP, kuasa untuk memutuskan keterangan prima facie ialah kuasa kehakiman yang terletak pada mahkamah. Seksyen 61A ATIPSOM mempunyai kesan mengecualikan kuasa kehakiman untuk mengadili sama ada keterangan mangsa membuktikan keterangan prima facie justeru menjadikannya tidak berperlembagaan kerana pencerobohan perundangan; (b) perkara 5(1) PP menghalang penggubalan mana-mana badan perundangan yang akan mengekang nyawa, kebebasan, atau kedaulatan undang-undang. Oleh kerana s 61A telah melucutkan hak pemohon untuk menyoal balas deponen, hak kebebasan mereka telah dilanggar; dan (c) semua orang adalah sama rata di sisi undang-undang dan berhak mendapat perlindungan undang-undang yang sama, oleh itu pemohon hendaklah dilayan secara adil dengan prosedur yang adil. Penafian hak untuk mencabar pendeposn dan menyoal balas saksi adalah jelas melanggar perkara 8(1) PP.
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I Diputuskan, menolak usul:

- (1) Seksyen 61A ATIPSOM melalui perkataannya masih mengekalkan kuasa kehakiman mahkamah untuk memutuskan dan membuat keputusan dengan kuasa mahkamah tidak dilanggar sebagai penimbang tara untuk membuat dapatan dan membuat keputusan. Seksyen 61A

- hanya berkaitan dengan keterangan prima facie dan pertimbangan pendeposon tersebut sendiri tidak menyediakan kes prima facie di mana untuk membuktikan kes prima facie mahkamah masih perlu melihat keterangan secara keseluruhan dalam membuat keputusan. Ini menunjukkan bahawa fungsi mahkamah sebagai penimbang tara muktamad tidak dicerobohi dan oleh itu seksyen tersebut tidak melanggar kuasa mahkamah dengan itu s 61A ATIPSOM tidak melanggar perkara 121(1) PP (lihat perenggan 14 & 22). A B
- (2) Ia sudah menjadi undang-undang yang mantap bahawa hak untuk menyoal balas tidak mutlak. Memandangkan fakta bahawa s 61A ATIPSOM adalah undang-undang khusus dan jelas yang telah diperuntukkan sebagai pengecualian yang dinyatakan dalam perkara 5(1) PP, maka pemakaian s 61A ATIPSOM tidak boleh disifatkan sebagai bertentangan dengan perkara 5(1) PP. Ia tidak menafikan perbicaraan yang adil memandangkan deposisi hanyalah untuk satu aspek keterangan yang akan dikemukakan semasa perbicaraan dan ia juga masih tertakluk untuk diperiksa oleh hakim bicara. Keterangan berdasarkan deposisi ini bukanlah muktamad berkenaan keterangan untuk membuktikan kes prima facie. Oleh itu, peruntukan yang dipersoal tidak melanggar perkara 5(1) PP (lihat perenggan 29–30). C D E
- (3) Di mana terdapat dua prosedur yang wujud secara selari, prosedur yang lebih drastik dan prejudis adalah tidak berperlembagaan sekiranya dalam undang-undang tidak ada garis panduan mengenai kelas kes di mana salah satu prosedur itu perlu diambil, tetapi ianya adalah berperlembagaan sekiranya undang-undang mengandungi peruntukan untuk rayuan, supaya keputusan di bawahnya boleh disemak oleh pihak berkuasa yang lebih tinggi. Seksyen 61A tidak melanggar syarat ini dengan melanggar perkara 8 PP memandangkan peruntukan rayuan di dalamnya terkandung dalam ATIPSOM. Bagi s 61A ATIPSOM, mahkamah tidak menolak sesiapa atau entiti dalam membuat keputusan dan mengekalkan kuasa mutlak dalam membuat penilaian kehakiman berkenaan dengan pendeposon yang dibuat (lihat perenggan 34–35). F G
- (4) Daripada bacaan s 5 ATIPSOM, ia adalah jelas bahawa peruntukan yang terkandung dalam s 61A akan mengatasi keperluan seperti yang terdapat dalam s 145 Akta Keterangan 1950 oleh kerana penggunaan *maxim generalibus specialia derogant*. Seksyen 5 ATIPSOM sendiri memperuntukkan penggunaan ATIPSOM untuk diguna pakai sekiranya ia bercanggah dengan peruntukan undang-undang bertulis lain dan melanggar undang-undang bertulis lain dan ini adalah situasi *maxim generalibus specialia derogant* terpakai yang mana Akta am tertakluk kepada Akta khusus. Ia adalah jelas bahawa peruntukan khusus tertentu dalam perundangan telah direka bentuk untuk mengatasi peruntukan undang-undang yang lebih umum dan, oleh itu, ini mesti H I

- A diberi kesan sepenuhnya. Seksyen 61A ATIPSOM tidak melanggar perkara 121(1), 8(1) dan 5(1) PP dan tidak sepatutnya diisytiharkan sebagai tidak berperlembagaan (lihat perenggan 37–38 & 43).]

Cases referred to

- B *Abul lwn Pendakwaraya* (Rujukan Jenayah No 44-48–04 Tahun 2017) (unreported) (refd)
Amurthalingam a/l Tamajeeren v PP [2018] 12 MLJ 529, HC (refd)
Datuk Hj Harun bin Hj Idris v PP [1977] 2 MLJ 155, FC (refd)
Deputy Chief Police Officer, Perak & Anor v Ramesh a/l Thangaraju [2001] 1 MLJ 161, CA (refd)
- C *Gakyah bt Buyong lwn Pendakwa Raya* [2016] 9 MLJ 403; [2016] 3 CLJ 919, HC (refd)
Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals [2018] 1 MLJ 545, FC (refd)
- D *Jimmy Seah Thian Heng & Ors v PP* [2019] 7 MLJ 308, HC (refd)
Lee Kwan Woh v PP [2009] 5 MLJ 301, FC (refd)
Letitia Bosman v PP and other appeals (No 1) [2020] 5 ML J 277, FC (folld)
Maria Chin Abdullah v Ketua Pengarah Imigresen & Anor [2021] 1 MLJ 750; [2021] 2 CLJ 579, FC (refd)
- E *Mohd Faudzi bin Othman v Pendakwa Raya* [2015] MLJU 768, HC (refd)
Mohamad Ezam bin Mohd Nor, Re [2001] 3 MLJ 372; [2002] 5 CLJ 156, HC (refd)
Pendakwa Raya v Ibrahim bin Sultan Mohamad [2020] MLJU 1267; [2020] 1 LNS 974, HC (refd)
- F *PP v Chew Siew Luan* [1982] 2 MLJ 119; [1982] CLJ Rep 285, FC (refd)
PP v Choo Chuan Wang [1992] 2 CLJ 1242, HC (refd)
PP v Dato' Yap Peng [1987] 2 MLJ 311, SC (refd)
PP v Kok Wah Kuan [2008] 1 MLJ 1, FC (refd)
PP v Ooi Kee Saik & Ors [1971] 2 MLJ 108 (refd)
- G *PP v Shahrulnizam Othman & Ors* [2010] MLJU 2228; [2011] 5 CLJ 674, HC (refd)
PP v Sumon Khan & Anor [2019] 2 ML J 215, CA (refd)
Tan Boon Liat @ Allen & Anor et al, Re; Tan Boon Liat v Menteri Hal Ehwal dalam Negeri & Ors; Chuah Han Mow v Menteri Hal Ehwal dalam Negeri & Ors; Subramaniam v Menteri Hal Ehwal dalam Negeri & Ors [1977] 2 MLJ 108, FC (refd)
- H *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case* [2017] 3 MLJ 561, FC (refd)
Shamim Reza bin Abdul Samad v PP [2011] 1 MLJ 471, FC (refd)
- I *Sivarasa Rasiiah v Badan Peguam Malaysia & Anor* [2010] 2 MLJ 333, FC (refd)
Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 1 MLJ 261, CA (refd)
Vigneswaran a/p Murugaiah lwn Pendakwaraya (Permohonan Jenayah No 44-85–04 Tahun 2017) (unreported) (refd)

Legislation referred to

Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 ss 5, 12, 52, 61A

Courts of Judicature Act 1964 s 30(1)

Criminal Procedure Code s 51A

Evidence Act 1950 ss 32, 145, 146

Federal Constitution arts 5(1), 8(1), 121(1)

Immigration Act 1959/63 s 35

Land Acquisition Act 1960 s 40

A Athimulan (K Kumaraendran with him) (Mohana Krishnan) for the applicant. Yusaini (Haslinda bt Che Seman with him) (Attorney General's Chambers) for the respondent.

Azmi Abdullah J:

[1] The applicants are facing three charges at the Klang sessions court under s 12 of the ATIPSOM. The prosecution delivered on the applicants as part of the evidence for the prosecution pursuant to s 51A of the Criminal Procedure Code ('the CPC') the depositions made by three persons mentioned as the victims in the three charges being Anmuni Maria, Yani Tri Anda and Fransisaka.

[2] The challenge mounted in this motion is against the constitutionality of s 61A of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 ('the ATIPSOM') with the impugned provision being argued to be against arts 121(1), 8(1) and 5(1) of the Federal Constitution ('the FC'). The learned sessions court judge exercising the provision of s 30(1) of the Courts of Judicature Act 1964, stayed the proceedings and transmitted the matter to the High Court to determine the constitutional challenge against s 61A of the ATIPSOM.

[3] Section 61A of the ATIPSOM essentially provides that the deposition of trafficked persons or smuggled migrants who cannot be found would be accepted as prima facie evidence without the evidence being tested under cross-examination at the trial for the charges under s 12 of the ATIPSOM being levelled against the applicants in this instance.

[4] Section 61A of the ATIPSOM states:

61A Admissibility of deposition of trafficked person or smuggled migrant who cannot be found

- (1) Notwithstanding anything contained in this Act and any written law to the contrary, where in any proceeding for an offence under this Act a testimony of any person in respect of whom an order of removal from

- A** Malaysia has been made by the Director General under section 32 or 33 or sub-s 56(2) of the Immigration Act 1959/63 is required by the court, there shall be admissible in evidence before that court any deposition relating to the subject matter of that proceeding made by that person:
- B** (a) in Malaysia before a Sessions Court Judge or a Magistrate in the presence or absence of the person charged with the offence; or
- (b) outside Malaysia before a consular officer or a judicial officer of a foreign country in the presence or absence of the person charged with the offence, and any such deposition shall, without further proof, be admitted as prima facie evidence of any fact stated in the deposition.
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- (2) It shall not be necessary for any party in any proceeding to prove the signature or official character of the Sessions Court Judge, Magistrate, consular officer or judicial officer before whom the deposition under subsection (1) was made.
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- (3) For the purposes of this section, a reference to —
- (a) A ‘deposition’ includes any written statement made upon oath; and
- E** (b) An ‘oath’ includes an affirmation or declaration in the case of persons allowed by law to affirm or declare instead of swear.
- (4) Nothing in this section shall prejudice the admission as evidence of any other depositions.
- F** ARTICLE 121(1) OF THE FEDERAL CONSTITUTION
- [5] Article 121(1) states:
- Judicial power of the Federation
- G** 121(1) There shall be two High Courts of co-ordinate jurisdiction and status, namely —
- (a) One in the States of Malaya, which shall be known as the High Court in Malaya and shall have its principal registry at such place in the States of Malaya as the Yang di Pertuan Agong may determine; and
- H** (b) One in the States of Sabah and Sarawak, which shall be known as the High Court in Sabah and Sarawak and shall have its principal registry at such place in the States of Sabah and Sarawak as the Yang di Pertuan Agong may determine;
- I** (c) (Repealed)
- (d) And such inferior courts as may be provided by federal law; and the High Courts and the inferior courts shall have jurisdiction and powers as may be conferred by or under federal law.

[6] The argument of the applicants is that the act of determining whether there is a prima facie evidence involves judicial assessment hence the power to decide a prima facie case is a judicial power that should rightly be exercised by a judge and no other. By virtue of art 121(1) of the Federal Constitution, the power to decide the prima facie evidence is a judicial power that is vested in the courts. Section 61A of the ATIPSOM has the effect of excluding the judicial power to adjudicate whether the victim's evidence proves a prima facie evidence hence rendering it unconstitutional due to legislative incursion.

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[7] Pertaining to whether the impugned provision is against art 121(1) of the FC, it must first be observed as trite that there is a presumption of constitutionality in every legislation enacted by parliament

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[8] It is also observed that the doctrine of separation of powers is to be practiced in order to have the necessary check and balance between the three known branches of the executive, legislative and the judiciary so that one branch does not encroach upon the sphere of the other and every branch is kept to within its confines or parameters. As much as the courts are to provide a check and balance to the powers of the legislative, it must also remind itself to refrain from transgressing the confines as limited by the FC and encroaches into the law making power of the legislature.

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[9] In reference to the decision in *Letitia Bosman v Public Prosecutor and other appeals (No 1)* [2020] 5 MLJ 277 the Federal Court stated at para 28:

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While none is superior to the other, both the judiciary and the Legislature are subject to the FC, being the supreme law of the country. In Malaysia only the FC is supreme law (see Tun Mohamed Suffian's *An Introduction to the Constitution of Malaysia* (3rd Ed) at p 17). This has an important implication: like all legal powers, judicial power and legislative powers have constitutional limits ...

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[10] In *Public Prosecutor v Kok Wah Kuan* [2008] 1 MLJ 1 at para 22 it was held:

So even if we say that judicial power vests in the courts, in law, the nature and extent of the power depends on what the constitution provides not what some political thinkers think judicial power is.

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[11] From the cited paragraph in *Letitia Bosman* this court thus is guided that given the provision of art 121 of the FC, the execution of the judicial power must be in accordance with Federal laws and cannot supersede the confines that have been laid down.

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[12] The majority decision of the Federal Court in the case *Maria Chin Abdullah v Ketua Pengarah Imigresen & Anor* [2021] 1 MLJ 750; [2021] 2 CLJ

- A 579 has again reemphasised that by stating at para 20:
- [20] Clearly, it is a term of art 121(1) of the Federal Constitution that the jurisdiction and powers of the courts are ‘as conferred by or under federal law’ ...
- B [13] It is this court’s finding that the impugned provision differs from *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case* [2017] 3 MLJ 561, *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2018] 1 MLJ 545, *Jimmy Seah Thian Heng & Ors v Public Prosecutor* [2019] 7 MLJ 308 and *Public Prosecutor v Dato’ Yap Peng* [1987] 2 MLJ 311, as those precedents deal with situations whereby the exercise of judicial power were being taken from the courts ie in *Semenyih Jaya* it was placed with the assessors, in *Indira Ghandi* it was with the Syariah Court whilst in *Jimmy Seah* and *Dato’ Yap Peng* it was with the public prosecutor.
- D [14] Section 61A of the ATIPSOM by its wording still retains the court’s judicial power to rule and decide with the court’s powers not being transgressed as the arbiter to make a finding and to arrive at a decision.
- E [15] Section 61A of the ATIPSOM in essence is in pari materia with s 40A of the Immigration Act (Amendment) 2002. The said s 40A was promulgated to resolve the problem of the government having to bear the high costs of providing foods and drinks for the illegal immigrants whilst they are under detention depots pending the conclusion of trial and also the concern of their country of origin as regards their detention. Hence, the existence of the provisions are to ensure that the lengthy detentions are avoided.
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- G [16] In discussing s 40A of the Immigration (Amendment) Act 2002, in *Public Prosecutor v Shahrulnizam Othman & Ors* [2010] MLJU 2228; [2011] 5 CLJ 674, the court decided that s 40A operates to the exclusion of any other written law since no such provision to the contrary has been inserted to the Act and this is also the same situation as found in s 61A of the ATIPSOM. It was the decision of the court that the right to cross-examine not being included in the section should be preserved:
- H Upon the reading of s 40A of the Act, the court was of the view that there is no lacuna in the section as it is quite clear that the words ‘Notwithstanding anything contained in this Act and any written law to the contrary’ explicitly excludes any other written laws that is the Evidence Act 1950 and the Rules of High Court 1980 in the application of s 40A. If Parliament had intended that any other provisions in any other written law to the contrary applies to s 40A of the Act, then it would have clearly stated so as it did in s 52(4) of the Anti-Trafficking in Persons Act 2007 where Parliament had intended that in the course of recording of evidence of the trafficked person, he shall be examined in accordance with the provisions of the Evidence Act 1950. *I am not prepared to read words into s 40A and interpret in the way learned counsel for the respondents had submitted. In the circumstances, the learned magistrate*
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was wrong in her approach to have allowed the respondents counsel the right to cross-examine the deponent. (Emphasis added.) A

[17] These further cases illustrate decisions pertaining to the working of s 61A of the ATIPSOM and the acceptance by the courts of the exception to the right to cross-examine in the provision therein. In *Mohd Faudzi bin Othman v Pendakwa Raya* [2015] MLJU 768, it was commented that the taking of the deposition before a sessions court judge or a magistrate has been intended to safeguard and prevent a deponent from being subjected to harassment or duress when making a deposition: B

[52] I observe that a deposition is required to be made before a sessions court judge or a magistrate if made in Malaysia. I am of the view that such requirement is clearly intended to prevent a deponent from being subjected to harassment or duress when making a deposition. The reason a deposition has to be made before a sessions court judge or magistrate is to ensure that justice is administered and accorded to the deponent when making the deposition. C
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[18] In *Gakyah bt Buyong lwn Pendakwa Raya* [2016] 9 MLJ 403; [2016] 3 CLJ 919 the High Court decided that the deponents could be cross-examined by referring to s 52 of the ATIPSOM. However, the Court of Appeal set aside the High Court decision and preserved the position that the deponents of the depositions could not be cross-examined. E

[19] In *Public Prosecutor v Sumon Khan & Anor* [2019] 2 MLJ 215, the Court of Appeal concurred with the High Court that the depositions made would still be subject to an analysis of its contents irrespective of the non-allowance for cross-examination and thus in the final decision made, the totality of evidence would form the basis for the decision and not a total reliance on the deposition alone: F

[43] However; we agree with the learned trial judge that ID7 (1–13) cannot be admitted on other grounds, namely: G

(a) Section 61A of the Act requires that before the depositions of the Bangladeshis can be admitted as evidence, there must be an order for removal of the Bangladeshis issued by the Director General (DG) of Immigration Department. In the present appeal, there was never any order of removal by the DG of Immigration ever produced by the prosecution. The rationale of allowing admissibility of admissions of migrant persons under s 61A of the Act was to cater for situations where the migrants were removed by order of the DG of immigration and hence their presence as witnesses could no longer be procured to support a charge under the Act against accused persons. Hence, the depositions (which are hearsay evidence) are allowed to be admitted. Without the order for removal, these depositions cannot be admitted. However, the prosecution could still adduce direct evidence by calling the subject ie the migrants themselves to testify, if they could be located. In the present appeal it is not clear whether the migrants were still available to testify or whether there was H
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- A such an order from the DG of Immigration for their removal.
- [44] It is also the finding of the learned judge that, even assuming that the 13 depositions ID7 (1–13) could be admitted as evidence, there is still the issue of the weight to be attached to the same given that the deponents are not subjected to cross-examination. We agree with the analysis by the learned trial judge as to the contents of the depositions to arrive at such conclusion. This is because the contents of the depositions of the Bangladeshis:
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- (a) did not aver that they wanted to be smuggled as migrants into Malaysia nor did they state that anyone specific and/or any named persons/persons told them that they would be brought into Malaysia using unlawful means;
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- (b) did not state that such person/s told them that they would be brought or smuggled into Sarawak or Malaysia without proper travelling documents or using unlawful papers. In fact, the depositions state ‘... telah memaklumkan bahawa segala dokumen perjalanan saya telah siap ...’
- D which gives the indication that all their travel documentation were ready and completed lawfully; and
- (c) did not state they had to engage unlawful/false passports/visas to get them smuggled into Malaysia as migrants and to work illegally.
- E [45] What is pertinent is that, the 13 depositions did not implicate the first and the second accused and/or Sivasankar that each of them were part of the plan to smuggle the said 13 Bangladeshis into Malaysia using unlawful means. There is no evidence that the 13 Bangladeshis had entered Indonesia or Malaysia illegally as it is undisputed that the 13 Bangladeshis had valid single entry visas and passports to enter Malaysia or Indonesia.
- F [46] Therefore, premised on the aforementioned. The learned trial judge did not err when His Lordship refused to admit and placed no weight on the said depositions of the 13 Bangladeshis ie ID7 (1–13).
- G [20] In *Amurthalingam a/l Tamajeeren v Public Prosecutor* [2018] 12 MLJ 529, the High Court in being moved to make a revision of the magistrate’s decision to disallow cross-examination of witness making a deposition decided to concur with the magistrate by deciding that since it was made under s 61A of the ATIPSOM, the admissibility as such is not subject to the Evidence Act 1950 which provides the right to cross-examine:
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- [17] A plain reading of s 61A on the other hand, relates to a situation where the deposition of a person who is both a smuggled migrant or a trafficked person and whom in respect of which an order of removal from Malaysia has been made by the Director-General of Immigration, becomes admissible as prima facie evidence of any fact stated therein. In this case, the respondent contended that the persons from whom the depositions were taken were smuggled migrants.
- I ...
- [31] Section 61A on the other hand, deals with the admissibility of depositions and not with the recording of evidence on oath as is the case under s 52.

[32] The opening words of s 61A namely 'notwithstanding anything contained in this Act and any written law to the contrary', indicates the exclusion of the provisions of the Evidence Act 1950 and hence the right to cross-examine.

A

...

[35] The other material distinction is that s 52 relates to a situation where a criminal prosecution has already been instituted meaning that a person is already charged. Section 61A on the other hand, relates to the taking of a deposition that can be taken at any time and even before a charge has been instituted.

B

[36] It is obvious that the intent of s 61A is to pre-empt a situation where the smuggled or trafficked person may be subject to deportation by virtue of an order made by the Director-General under the relevant provisions of the Immigration Act 1959/63.

C

[37] Section 61A 1(a) and (b) also allows such a deposition to be taken in the presence or absence of the person charged with the offence.

D

...

[44] The respondent had also submitted that the witnesses were persons who could not be found within the meaning of s 61A. In their affidavit affirmed on 23 August 2011, it was stated that the immigration department had deported 13 of the deponents. The report of the immigration department was also attached as exh 'SAA1'. These deponents were now persons who cannot be found within the meaning of s 61A.

E

[45] I was satisfied that the depositions were indeed taken under s 61A and not the case where the evidence was recorded on oath pursuant to s 52. There was no right to interfere therefore for the applicant to cross-examine.

F

[21] In *Pendakwa Raya v Ibrahim bin Sultan Mohamad* [2020] MLJU 1267; [2020] 1 LNS 974, it was held that the deposition can be accepted provided that there has been an order for removal of the deponent from the Director General of Immigration and the burden rests on the prosecution to provide evidence pertaining to the removal order:

G

[13] Pada pendapat mahkamah ini, sandaran kepada deposisi di bawah s 61A ATIPSOM hanya boleh dibuat apabila deponen itu tidak hadir di Mahkamah perbicaraan kes ATIPSOM atas sebab satu perintah pemindahan telah dibuat terhadapnya oleh Ketua Pengarah Imigresen. Sekiranya tiada perintah sedemikian dibuat maka keterangan deposisi itu tidak boleh diterima sebagai keterangan prima facie, tanpa bukti lanjut, mengenai fakta yang dinyatakan di dalamnya. Dalam keadaan ini pihak pendakwaan harus mengemukakan bukti lanjut sama ada melalui keterangan lisan, keadaan atau dokumentar mengenai fakta yang dinyatakan di dalam deposisi itu.

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...

I

[16] Dengan yang demikian, pada pendapat mahkamah ini, mahkamah yang membicarakan kes ATIPSOM adalah mahkamah yang harus berpuas hati bahawa satu perintah pemindahan telah dibuat oleh Ketua Pengarah Imigresen terhadap deponen sebelum deposisi itu boleh diterima sebagai keterangan. Dalam keadaan

A demikian, adalah menjadi beban ke atas pendakwa untuk memberi keterangan mengenainya seperti yang dinyatakan oleh Dr Choo Kah Sing PK (pada ketika itu) di dalam kes Mohd Faudzi.

B [22] From the decided cases, this court is of the opinion that s 61A is concerned only with prima facie evidence and the consideration of the deposition in itself does not provide a prima facie case whereby in order to establish a prima facie case the courts still have to view the evidence in totality in arriving at a decision. This goes to show that the court's function as the final
C arbiter is not encroached upon and thus the section does not usurp the powers of the court hence s 61A of the ATIPSOM does not infringe art 121(1) of the FC.

ARTICLE 5(1) OF THE FEDERAL CONSTITUTION

D [23] The applicants argue that by having this article, it does not authorise parliament to enact any legislature that would deprive life or liberty contrary to the Federal Constitution or the rule of law with art 5(1) stating:

E No person shall be deprived of his life or personal liberty save in accordance with the law.

F [24] The applicants further argue that s 61A has deprived the applicants of their liberty by having the provision that the deponents cannot be cross examined for their depositions thus there is a clear violation of statutory requirement of the Evidence Act and Criminal Procedure Code. The wording of 'notwithstanding anything contained in this Act and any written law' does not purport to exclude the concept of rule of law.

G [25] In *Public Prosecutor v Ooi Kee Saik & Ors* [1971] 2 MLJ 108, the late and venerable Raja Azlan Shah stated:

H But as far as I am aware, no constitutional state has seriously attempted to translate the 'right' into an absolute right. Restrictions are a necessary part of the 'right' and in many countries of the world freedom of speech and expression is, in spite of formal safeguards, seriously restricted in practice.

I [26] In *Re Mohamad Ezam bin Mohd Nor* [2001] 3 MLJ 372; [2002] 5 CLJ 156, it was enunciated as below:

The primary provision upon which the above is founded is art 5(1) of the Federal Constitution, which provides:

No person shall be deprived of his life or personal liberty save in accordance with the law.

The words 'save in accordance with the law' require that there must be specific and explicit law that actually provides for it. Since the Federal Constitution is the

- supreme law of the Federation, such strict interpretation is to be applied in interpreting s 117 CPC. There is no room for permissive interpretation that a deprivation of the liberty of the suspect to enable the police to question or interrogate him is allowed because there is no law against it when s 117 CPC itself does not make it clear. A
- B
- [27] For s 61A of the ATIPSOM it is apparent that the provision explicitly provides for the acceptance of depositions without being subjected to cross examination.
- C
- [28] ‘In accordance with law’ has been interpreted as such in these authorities:
- (a) the phrase ‘in accordance with law’ in art 5(1) ‘is wide enough to cover procedure as well’ (*Re Tan Boon Liat @ Allen & Anor et al; Tan Boon Liat v Menteri Hal Ehwal dalam Negeri & Ors; Chuah Han Mow v Menteri Hal Ehwal dalam Negeri & Ors; Subramaniam v Menteri Hal Ehwal dalam Negeri & Ors* [1977] 2 MLJ 108) and which procedure must not be arbitrary or unfair (*Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261); D
 - (b) implies a fair trial (*Shamim Reza bin Abdul Samad v Public Prosecutor* [2011] 1 MLJ 471) in both procedure and substance (*Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301; see also *Deputy Chief Police Officer, Perak & Anor v Ramesh all Thangaraju* [2001] 1 MLJ 161), within a reasonable time by an impartial court established by law (*Public Prosecutor v Choo Chuan Wang* [1992] 2 CLJ 1242); E
 - (c) accords a fundamental right of access to justice (*Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2010] 2 MLJ 333); F
 - (d) it was also enunciated that art 5(1) ‘guarantees that neither life nor personal liberty may be deprived save in accordance with law’ (*Shamim Reza bin Abdul Samad v Public Prosecutor* [2011] 1 MLJ 471 per Gopal Sri Ram FCJ, delivering the judgment of the court) and that art 5(1) ‘stipulates that no person shall be deprived of his life or personal liberty save in accordance with the law ... *this right to personal liberty is not absolute and is subject to qualifications*’; and G
 - (e) in *Re Mohamad Ezam bin Mohd Nor* [2001] 3 MLJ 372; [2002] 5 CLJ 156, it was held that the phrase ‘save in accordance with law’ in art 5(1) *requires that there must be specific and explicit law that actually provides for it.* H
- I
- [29] It has always been the position of the law that the right is not absolute. Given the fact that s 61A of the ATIPSOM is a specific and explicit law which has been provided for as being the exclusion stated in art 5(1) of the FC, hence

A the application of s 61A of the ATIPSOM cannot be deemed to be in contravention of art 5(1) of the FC.

B [30] It does not deny a fair trial since the deposition is only a single aspect of the evidence to be produced at trial and even then it is still subject to be examined by the trial judge as decided in *Public Prosecutor v Sumon Khan*. This evidence by deposition is not the be all and end all as regards evidence to prove a prima facie case. Thus, this court views that the impugned provision does not infringe upon art 5(1) of the FC.

C ARTICLE 8(1) OF THE FEDERAL CONSTITUTION

D [31] Article 8(1) of the FC deals with equal protection of the law with no discrimination against citizens irrespective of race, religion, descent, place of birth or gender with the exact wording being:

- E 8 Equality
- (1) All persons are equal before the law and entitled to the equal protection of the law.
- F (2) Except as expressly authorised by this Constitution, there shall be no discrimination against citizens on the ground only of religion, race, descent, place of birth or gender in any law or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment.

G [32] The applicants argue that all persons are equal before the law and equal protection of the law, hence the applicants should be fairly treated with fair procedure. Denial of the right to challenge the deposition and to cross examine the witness is a clear violation of art 8(1) of the FC. As all persons are equal before the courts and tribunals the applicants are entitled to equal treatment in the trial process in the determination of the charges faced by the applicants.

H [33] In *Datuk Hj Harun bin Hj Idris v Public Prosecutor* [1977] 2 MLJ 155 it was held that the equality provision is not absolute and it does not mean that all laws must apply uniformly to all persons in all circumstances everywhere. Lord President Suffian has laid down the principle involved by stating:

I Doing the best we can, we are of the opinion that the principles relevant to this appeal that may be deduced from the Indian decisions and from consideration of our constitution are these:

1. The equality is not absolute. It does not mean that all laws must apply uniformly to all persons in all circumstances everywhere.
2. The equality provision is qualified. Specifically, discrimination is permitted within cl (5) of art 8 and within art 153.

3. The prohibition of unequal treatment applies not only to the legislature but also to the executive — that is seen from the words ‘public authority’ in cl (4) and ‘practice’ in cl (5)(b) of art 8. **A**
4. The prohibition applies to both substantive and procedural law.
5. Article 8 itself envisages that there may be lawful discrimination based on classification — thus Muslims as opposed to non-Muslims (para (b) of cl (5) of art 8); aborigines as opposed to others (para (c)); residents in a particular state as opposed to residents elsewhere (para (d)); and Malays and natives of Borneo as opposed to others who are not (art 153). **B**
6. In India the first question they ask is, is there classification? If there is and subject to other conditions, they uphold the law. If there is no classification, they strike it down. With respect we would agree with the Solicitor-General’s submission that the first question we should ask is, is the law discriminatory, and that the answer should then be — if the law is not discriminatory, if for instance it obviously applies to everybody, it is good law, but if it is discriminatory then because the prohibition of unequal treatment is not absolute but is neither expressly allowed by the constitution or is allowed by judicial interpretation we have to ask the further question, is it allowed? If it is, the law is good, and if it is not, the law is void. **C**
7. In India discriminatory law is good law if it is based on ‘reasonable’ or ‘permissible’ classification, using the words used in the passage reproduced above from the judgment in *Shri Ram Krishna Dalmia* AIR 1958 SC 538, provided that: **E**
- (i) The classification is founded on an intelligible differentia which distinguishes persons that are grouped together from others left out of the group; **F**
 - (ii) The classification is founded on an intelligible differentia which distinguishes persons that are grouped together from others left out of the group; and **G**
 - (iii) The differentia has a rational relation to the object sought to be achieved by the law in question. The classification may be founded on different bases such as geographical, or according to objects or occupations and the like. What is necessary is that there must be a nexus between the basis of classification and the object of the law in question. **H**

The Solicitor-General submits that if the Indian doctrine of classification is to be accepted by our courts, which he argues has not been done, it may be accepted subject to the modification that the courts should not take it upon itself to consider whether the classification is reasonable or not, a task which should be left to the legislature. In our opinion the doctrine of classification should be accepted by our courts, subject to what we said in para 6 above. We adhere to what was said in *Public Prosecutor v Khong Teng Khen* [1976] 2 MLJ 166 at p 170: **I**

Para 19

A The principle underlying art 8 is that a law must operate alike on all persons under like circumstances, not simply that it must operate alike on all persons in any circumstances, nor that it must be general in character and universal in application and that the State is no longer to have the power of distinguishing and classifying persons ... for the purpose of legislation *Kedar Nath v State of West Bengal* AIR 1953 SC 404–406). In my opinion, the law may classify persons into children, juveniles and adults, and provide different criteria for determining their criminal liability or the mode of trying them or punishing them if found guilty; the law may classify persons into women and men, or into wives and husbands, and provide different rights and liabilities attaching to the status of each class; the law may classify offences into different categories and provide that some offences be triable in a magistrate's court, others in a sessions court, and yet others in the High Court; the law may provide that certain offences be triable even in a military court; fiscal law may divide a town into different areas and provide that ratepayers in one area pay a higher or lower rate than those in another area, and in the case of income tax provide that millionaires pay more tax than others; and yet in my judgment none of these cases can the law be said to violate art 8. All that art 8 guarantees is that a person in one class should be treated the same as another person in the same class, so that a juvenile must be tried like another juvenile, a ratepayer in one area should pay the same rate as paid by another ratepayer in the same area, and a millionaire the same income tax as another millionaire, and so on. 'As regards the narrower question whether or not the courts should leave it to the legislature alone to go into the reasonableness of the classification, we think that the court should not, that in other words the court should consider the reasonableness of the classification'.

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8. Where there are two procedures existing side by side, the one that is more drastic and prejudicial is unconstitutional if there is in the law no guideline as to the class of cases in which either procedure is to be resorted to. *But it is constitutional if the law contains provisions for appeal, so that a decision under it may be reviewed by a higher authority. The guideline may be found in the law itself; or it may be inferred from the objects and reasons of the bill, the preamble and surrounding circumstances, as well as from the provisions of the law itself. The fact that the executive may choose either procedure does not in itself affect the validity of the laws.* (Minority judgment in *Ni Caterers* AIR SC 1581 and judgment in *M Chhagganial* AIR 1974 SC 2009. We think that we should follow the same principle.

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9. In considering art 8 there is a presumption that an impugned law is constitutional, a presumption stemming from the wide power of classification which the legislature must have in making laws operating differently as regards different groups of persons to give effect to its policy (per Sastri C J in *Anwar AH* AIR 1952 SC 75).

I

10. Mere minor differences between two procedures are not enough to invoke the inhibition of the equality clause (per Bhagwati J in *Chhagganial* AIR 1974 SC 2009).

[34] In item 8 of the above cited case it was held, where there are two procedures existing side by side, the one that is more drastic and prejudicial is unconstitutional if there is in the law no guideline as to the class of cases in which either procedures is to be resorted to, but it is constitutional if the law contains provisions for appeal, so that a decision under it may be reviewed by a higher authority. This court views that s 61A does not fall foul of this condition as to infringe upon art 8(1) of the FC given the provision for appeal therein contained in ATIPSOM 2007.

A

B

[35] The authority of *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case* [2017] 3 MLJ 561 must be distinguished as s 40 of the Land Acquisition Act 1960 has the effect of the court having to abdicate its power to make a ruling by having to defer to the assessors in the granting of the award. For s 61A of ATIPSOM the court does not defer to anyone or entity in deciding and retains absolute power in making a judicial assessment as regards the deposition made.

C

D

SECTION 5 OF THE ATIPSOM

[36] The section reads:

E

- (1) The provisions of this Act shall be in addition to, and not in derogation of, the provisions of any other written law relating to trafficking in persons and smuggling of migrants
- (2) In any event of any conflict or inconsistency between the provisions of this Act and those in any written laws, the provisions of this Act shall prevail and the conflicting or inconsistent provisions of such other written laws shall, to the extent of the conflict or inconsistency, be deemed to be superseded.

F

G

[37] From the reading of s 5 of the ATIPSOM it is clear that the provisions contained in the Act ie in this situation, s 61A would override the requirement as found in s 145 of the Evidence Act 1950 due to the use of the maxim *generalibus specialia derogant*.

H

[38] Section 5 of the ATIPSOM itself provides for the application of ATIPSOM 2007 to prevail in the event that it conflicts with provisions of other written laws and supersedes the other written laws and this is the situation of the maxim *generalibus specialia derogant* being applicable which is that a general act is made subject to a specific act. There are apparent that certain specific provisions in the legislation are designed to prevail over the more general provisions of the law and these must be given its full effect which is the foundation of this maxim.

I

A [39] The maxim was explained in *Public Prosecutor v Chew Siew Luan* [1982] 2 MLJ 119; [1982] CLJ Rep 285 that held:

B *Generalibus specialia derogant* is a cardinal principle of interpretation. It means that where a special provision is made in a special statute, that special provision excludes the operation of a general provision in the general law ... It would be erroneous to apply expressions used and provisions made in a statute to another and entirely different one in complete disregard of the latter's express stipulations in light of its specific purpose and object.

C CONCLUSION

D [40] Section 61A of the ATIPSOM as decided in *Abul lwn Pendakwaraya* (Rujukan Jenayah No 44-48-04 Tahun 2017) (unreported) does not have the same effect as *Semenyih Jaya* as its promulgation is to resolve the issue found in s 35 of the Immigration Act whereby the witnesses who are migrants that needed to be deported would not have to wait until the conclusion of the trial for the process of deportation to be completed.

E [41] The provision of s 32 of the Evidence Act shares a similarity with s 61A of the ATIPSOM that enables the witnesses that are untraceable to have their evidence accepted in their absence and without being cross-examined. The process of appeal is also available and using the principle laid down in *Datuk Hj Harun Idris*, this ensures the constitutionality of s 61A of ATIPSOM.

F [42] The Court of Appeal in Criminal Appeal no B-05-335-08 of 2017 upheld the decision in *Vigneswaran a/p Murugaiah lwn Pendakwaraya* (Permohonan Jenayah No 44-85-04 Tahun 2017) (unreported), wherein it was decided that s 61A of the ATIPSOM is a special provision that exempts the right to cross-examine under s 146 of the Evidence Act with the provision not being unconstitutional. Hj Ghazali Hj Cha J stated in the criminal application:

G Walau bagaimanapun saya tidak bersetuju dengan hujahan peguambela tersebut berdasarkan kepada alasan-alasan berikut:

H (a) Seksyen 61A Akta 670 seperti yang diujahkan oleh Responden merupakan satu peruntukan khas yang mengecualikan hak untuk menyoal balas di bawah Seksyen 146 Akta Keterangan 1950. Niat Parlimen untuk mengecualikan perkara ini hendaklah direalisasikan.

I [43] As a conclusion this court decides that s 61A of the ATIPSOM does not contravene arts 121(1), 8(1) and 5(1) of the FC and should not be declared unconstitutional. Hence, this motion is hereby dismissed

Motion dismissed.

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Reported by K Selvaraju

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